4-30-93 Lisa

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Marcal Paper Mills, Inc.,	)	**Docket No. TSCA-PCB-II-91-0110**
	)	
Respondent	)	

ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION

This is a civil penalty proceeding brought under section 16(a), of the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. The complaint charged Respondent, Marcal Paper Mills, Inc., in six counts with violating federal regulations governing polychlorinated biphenyls (PCBs) (40 C.F.R. Part 761).

Respondent is a New Jersey corporation which owns a tissue paper manufacturing plant located in Elmwood Park, New Jersey. The complaint, dated March 26, 1991, was based upon a random PCB inspection of the facility, conducted by EPA toxic substances inspectors on October 26, 1989.

In Count I, Respondent is alleged to have failed or refused to maintain records of annual inspections and maintenance history for a transformer bearing a serial number 2490363 for the years 1986 through 1989, as required by 40 C.F.R. § 761.30(a)(1)(xii). A separate violation and penalty of $3,000 is assessed by Complainant with respect to each of those four years. In Count II, the same violation of 40 C.F.R. § 761.30(a)(1)(xii) is alleged with respect to another PCB transformer, bearing serial number 3142-1, for

failure to maintain annual inspection records for the years 1985 through 1988. Count III alleges the same violation for the same four years, with respect to a PCB transformer bearing the serial number 3143-1. For each of Counts II and III, Complainant proposes to assess a penalty of $13,000 for each of the four years at issue.

Count IV alleges failure to register two PCB transformers with the local fire response personnel within 30 days of discovery that they were PCB transformers, as required by 40 C.F.R. § 761.30(a)(1)(xv)(D). The proposed penalty for that count is $20,000. In Count V, Respondent is charged with failure or refusal to prepare annual documents concerning the disposition of PCBs and PCB items at Respondent's facility for the years 1985 through 1988, as required by 40 C.F.R. § 761.180(a). For each of those four years a separate penalty of $10,000 is proposed. Finally, in Count VI, Respondent is alleged to have failed to mark the means of access to a PCB transformer with the PCB mark M_L, as required by 40 C.F.R. § 761.40(j). The total penalty proposed in the complaint is $179,000.

In its answer, Respondent denied all of the violations, set forth several affirmative defenses and requested a hearing. The parties submitted pre-hearing exchange documents on or around December 20, 1991. On August 12, 1992, Complainant filed a motion for a partial accelerated decision with regard to liability on all six counts, on the basis that no genuine issues of material fact existed. Respondent submitted an opposition to the motion on

August 28, 1992, which Complainant moved to strike as being untimely.

The motion to strike Respondent's brief in opposition will be denied. It was due on August 27, 1992, which is ten days as provided in the Rules of Practice for responses to motions, 40 C.F.R. §22.16(b), plus five days allowed under 40 C.F.R. §22.07(c) for responses to pleadings served by mail. Respondent's opposition brief was only one day late and does not prejudice the Complainant. In any event, the importance of considering the arguments and exhibits of both parties outweighs any interest in sanctioning a party for submitting a responsive pleading one day late.

D I S C U S S I O N

Respondent maintains that an accelerated decision is not warranted on any of the six counts due to the existence of genuine issues of material facts and/or evidence that Respondent had in fact complied with the regulations that it was charged with violating.

With regard to Counts I, II, and III, Respondent was required to perform inspections of its PCB transformers on an annual basis (rather than quarterly as required by 40 C.F.R. §761.30(a)(1)(ix)), with a minimum of 180 days between inspections, according to the reduced visual inspection frequency provision, 40 C.F.R. § 761.30(a)(1)(xiii), for transformers that utilize certain risk

reduction measures.[1/] (Complaint ¶¶ 13, 19, 25) Respondent was cited, not for failure to conduct those inspections, but for failure to maintain records of these inspections, and maintenance histories, with respect to three PCB transformers.

As to Count I, Respondent has submitted records of inspection for the year 1986, and asserts that it also has records reflecting the pre-removal inspection in 1989 (Opposition, Exhibit F). A document entitled "Transformer Inspection Report" dated August 22, 1986 is included, but no similar report for 1989. Various documents dated in 1989 refer to the transformer at issue, such as quotations, plans and orders for retrofilling, and hazardous waste manifests regarding the removal of the transformer and the drained transformer oil from the site on June 28, 1989 (Opposition, Exhibit F). Because the transformer was removed in mid-1989, it may have been unnecessary for Respondent to have conducted the annual visual inspection that year.

Respondent's argument that the transformer was an off-line spare transformer is unavailing on the issue of liability, because the regulatory requirement at issue pertains to PCB transformers which are in use or stored for reuse. See, 40 C.F.R. § 761.30(a)(1)(ix).

[1/] One of the two risk reduction measures is "A PCB Transformer which has been tested and found to contain less than 60,000 ppm PCBs . . . ." The transformer at issue in Count I was tested in 1986 and found to contain 550 ppm PCBs. The transformers at issue in Counts II and III were tested in 1985 and found to contain 2750 ppm and 2780 ppm PCBs, respectively (Respondent's pre-hearing exchange, Exh D).

The regulatory requirement that Respondent is charged with violating in Count I is 40 C.F.R. § 761.30(a)(1)(xii), which provides, in pertinent part:

> Records of inspection and maintenance history shall be maintained at least 3 years after disposing of the transformer and shall be made available for inspection, upon request by EPA. Such records shall contain the following information for each transformer . . . .

While it appears that Respondent did not maintain at the facility visual inspection records and maintenance history for the years 1987 and 1988,[2/] Respondent did produce such records for 1986, and apparently did not need to produce them for 1989. Consequently, Respondent cannot be found liable for all of the allegations set forth in Count I at this point in the proceeding. For this reason, and for the reason that a piecemeal ruling on Count I is not warranted when related issues remain controverted, Complainant's motion will be denied with respect to Count I.

In regard to Count II, Respondent has submitted visual inspection reports and maintenance history for transformer number 3142-1, covering all four years that were alleged in the complaint: 1985 through 1988 (Opposition, Exhibit G). However, Respondent's initial response to the request for those documents was a memorandum, dated November 2, 1989, from Ron Krieger to "File," stating that "Documentation of the annual inspections of Marcal PCB Transformers were inadvertently not accomplished. . . . Visual inspections for leakage were done by this writer at least once per

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[2/] See note 3 and accompanying text, infra.

calendar year at a minimum interval of 180 days. . . . Documentation of annual inspections will begin immediately."[3/] (Opposition, Exhibit D; Complainant's pre-hearing exchange, Exhibit 7). Complainant argues that the statement is a conclusive admission by Respondent that it failed to prepare and maintain the inspection records. This argument is rejected for the reason that the statement is a pre-litigation, non-judicial admission which may be rebutted with evidence. See, In re Caschem, Inc., Docket No. II TSCA-PMN-89-0106 at 9, n. 14 (Order Upon Cross-Motions for Partial Accelerated Decision); In re Pitt-Des-Moines, Docket No. EPCRA-VIII-89-06 at 19 (Initial Decision, July 24, 1991). Respondent's presentation, as exhibits in its Opposition, of the inspection and maintenance records is sufficient evidence to preclude an accelerated decision in favor of Complainant on Count II.

However, it may be argued that because these inspection and maintenance history records were not submitted until after Respondent's November 14, 1989 post-inspection submission of documents, and 40 C.F.R. § 761.30(a)(1)(xii) requires that the records "shall be made available for inspection, upon request by EPA," a violation could be found on the basis of Respondent's failure to immediately produce the records upon the inspector's

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[3/] This memorandum was presented by Respondent as its only documentary evidence in opposition to the allegations set forth in Count I with respect to the years 1987 and 1988.

request.[4/] Respondent asserts that it only received notice of an inspection at the time the inspectors arrived at the facility, and that the inspector "refused to wait for the records or return for them" (Opposition, Statement of Facts). Taking that assertion and any reasonable inferences therefrom as true for purposes of ruling on a motion for accelerated decision, factual questions arise which render inappropriate a summary determination of a violation of 40 C.F.R. § 761.30(a)(1)(xii). Complainant's motion will be denied with respect to Count II.

Concerning Count III, Respondent has provided maintenance history documents for transformer number 3143-1 from 1985 through 1988, and has provided visual inspection reports for 1986 through 1988 (Opposition, Exhibit H). For the same reason as that stated for Count II, Complainant's motion will be denied with respect to Count III.

Respondent sets forth two arguments with respect to Count IV. First, it claims that its own fire brigade is the "fire response personnel with primary jurisdiction" with which it is required to register its PCB transformers. Therefore any documents in Respondent's possession would satisfy the regulatory requirement. Respondent does not describe the fire brigade in the record except in correspondence, dated September 4, 1991, from Respondent to

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[4/] Complainant presented undisputed evidence that the EPA inspector "requested PCB Transformer inspection records for Respondent's facility, but Respondent was unable to produce these inspection records." Affidavit of EPA inspector Albert J. Mullin, dated July 22, 1992, ¶ 11, attached to Motion.

complaint counsel per request during a settlement conference. In that correspondence, Respondent describes its fire brigade as consisting of over 70 employees who are trained, both off-site by a county police and fire academy, and on-site through monthly programs, in a variety of fire safety and fire fighting skills (Correspondence, dated September 4, 1991, at 5).

Second, Respondent asserts compliance with that requirement through tours of the facility provided to the Elmwood Park Volunteer Fire Department and local Fire Inspector, during which a site plan identifying locations of all transformers is provided (Opposition, Exhibit I). Respondent contends that the fire department treats most transformers as though they were PCB-contaminated, regardless of their reported status, and adds that it allowed the fire department to conduct training of its personnel at Respondent's facility. Respondent registered the transformer at issue with the Elmwood Park Fire Department after the EPA inspection, on November 13, 1989, long after discovery that it was contaminated with PCBs.

The regulatory requirement at issue in Count IV is 40 C.F.R. § 761.30(a)(1)(xv)(D), requiring any mineral oil transformer which is tested and found to be contaminated at 500 ppm or greater PCBs to be registered "in writing with fire response personnel with primary jurisdiction . . . within 30 days of discovery." The November 1989 registration was not within the 30 days of discovery. Any tours for the fire department do not constitute written

registration, and the site plan does not appear to indicate that any transformers contained PCBs.

The question remaining concerns Respondent's own fire brigade. The definition of "fire response personnel with primary jurisdiction" is provided in 40 C.F.R. § 761.30(a)(1)(vi), to wit: "the fire department or fire brigade which would normally be called upon for the initial response to a fire involving the equipment." While Respondent does not present documentation informing its fire brigade of the PCB transformers, Respondent has raised a material question of fact with respect to whether any registration of the PCB transformers with its own fire brigade was sufficient to satisfy 40 C.F.R. § 761.30(a)(1)(xv)(D). Complainant's motion will be denied with respect to Count IV.

Turning to Count V, Respondent is alleged to have failed to prepare annual documents on the disposition of PCBs and PCB items for the years 1985 through 1988. Following the EPA inspection, Respondent submitted reconstructed annual documents, dated October 31, 1989. (Respondent's Pre-hearing Exchange, Exhibit E). Respondent argues that at the time of the inspection, it maintained all of the information required to be included in the annual documents at the facility, but not in the form requested by the EPA inspector. Respondent refers to the information contained in its Opposition, Exhibits F, G and H, which include the visual inspection records and maintenance history of the PCB transformers. That information is relevant to the requirement for use of PCB transformers in 40 C.F.R. § 761.30(a)(1)(xii), and may constitute

some of the annual records required to be maintained at the facility under § 761.180(a)(1), i.e. manifests and certificates of disposal.

However, there is a separate recordkeeping requirement in 40 C.F.R. § 761.180(a), which requires an annual document log to be compiled for each calendar year, to include the items of information listed in § 761.180(a)(2). Respondent has not shown that it had compiled that information into an annual log, or even that it had all of that information compiled in any format, "prepared for each facility by July 1 covering the previous calendar year" and "available for inspection at the facility" at the time of the EPA's inspection.

The necessity of the compiling that information into one annual document has been emphasized in several administrative decisions. In re Bell & Howell, Docket Nos. TSCA-V-C-033, -034, -035, at 23-24 (Initial Decision, February 3, 1983; affirmed in part, Final Decision, December 2, 1983); In re City of Detroit, Docket Nos. TSCA-V-C-82-87, -83-97, -94-87, -92-87 at 27-29 (Initial Decision, August 25, 1989; Final Order on other Counts, February 6, 1990) (both requirements of section 761.180(a), annual records and the annual document, are essential; "[i]f no sanctions were provided for failure to provide [the annual] document unless and until an inspection, there would exist no incentive to comply" and the public would not be protected by the Act as intended); In re State of West Virginia Department of Highways, Docket No. TSCA-III-136, at 5-6 (Initial Decision, March 21, 1986; penalty

affirmed, Final Order, January 21, 1987) (Respondent held liable for failure to compile and maintain annual documents although all information necessary to do so was in respondent's possession).

Respondent has not raised any genuine issues of material fact in opposition to Complainant's motion as to the issue in Count V concerning annual documents. Respondent did not satisfy the requirement to prepare and maintain the annual document logs for the years 1985 through 1988, and Complainant is entitled to judgment as a matter of law on Count V.[5/]

The final violation, Count VI, alleges failure to mark with the M_L label the entrance to Substation Number 1 at Respondent's facility containing a PCB transformer, in violation of 40 C.F.R. § 761.40(j). That provision states, in pertinent part:

> PCB Transformer locations shall be marked as follows:
> (1) Except as provided in paragraph (j)(2) of this section, as of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L as required by paragraph (a) of this section.

In response, Respondent asserts in its fifth affirmative defense that it "had marked all of the PCB Transformers with the appropriate mark so that it could be easily read by firemen fighting a fire involving the equipment . . . ." In its

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[5/] The extent to which Respondent had the required information on site at the time of the inspection, may be relevant to the amount of penalty to be assessed for Count V. See, In re State of West Virginia, Department of Highways, supra.

opposition, Respondent argues that there was a marking on the entrance to the substation, but that it had been recently covered with paint. The substation itself was not marked because it would have caused confusion in an emergency situation, as it contained two non-PCB transformers. Respondent asserts further that local fire officials knew the location of all transformers on the premises, and that the transformer at issue was not in use because it was wet.

Assuming all of these arguments as true, none of them could avoid liability, and therefore Respondent has not raised any material issues of fact. The requirement is clear, and distinct from the requirement to mark the PCB transformer itself with the M_L label. See, 40 C.F.R. §§ 761.40(a)(2) and (c)(1). The importance of marking the means of access to a PCB transformer as well as the transformer itself was pointed out by Complainant in its Motion (at 17) and is expressed in the Federal Register announcement of the so-called "Fires Rule" which includes the regulatory provision at issue. 50 Fed. Reg. 29170 (July, 17, 1985). See also, In re New Waterbury, Ltd., A California Limited Partnership, Docket No. TSCA-I-88-1069, Initial Decision (July 8, 1992) at 41. Complainant's motion will be granted with respect to Count VI.

There is another motion filed by Complainant that will be addressed here. Entitled an "Omnibus Motion," it requested that a narrative argument included within Respondent's pre-hearing exchange be stricken as being beyond the scope of the pre-hearing exchange order, dated July 17, 1991, and requested Respondent to

provide a brief narrative summary of testimony of the witnesses it intended to call at the hearing.

That motion will be denied on both requests. There is no prohibition in the Rules of Practice, 40 C.F.R. Part 22, on providing narrative explanations in pre-hearing exchange documents. Indeed, Respondent's narrative is directly responsive to the specific request, in the July 17, 1991 pre-hearing exchange letter, for Respondent to state the factual basis for denial of the violations alleged in complaint. As to summary of testimony, no such narrative was requested of either party in the pre-hearing exchange letter. Because the pre-hearing exchange was therein "otherwise ordered" by the undersigned, the parties were not required to submit the information in the format set forth in 40 C.F.R. § 22.19(b).[6/]

O R D E R

1. Complainant's motion for accelerated decision on liability is GRANTED with respect to Counts V and VI.

2. Complainant's motion for accelerated decision on liability is DENIED with respect to Counts I, II, III, and IV.

[6/] That provision states in part, "Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony . . . ."

3. Complainant's motions to strike Respondent's brief in opposition, to strike argument in Respondent's pre-hearing exchange and motion for supplementation of information are DENIED.

Dated this 20th day of April 1993.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION**, dated April 20, 1993, in re: Marcal Paper Mills, Inc., Dkt. No. TSCA-PCB-II-91-0110, was mailed to the Regional Hearing Clerk, Reg. II, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: April 20, 1993

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